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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDGARDO ANTONIO ABARCA, Defendant and Appellant.	A157361 (San Mateo County Super. Ct. No. 16-SF-005231)

Defendant Edgardo Antonio Abarca appeals his conviction of two counts of making criminal threats in violation of Penal Code section 422. The single issue raised on appeal is whether the trial court erred in permitting the introduction of evidence of a separate incident occurring some three months later in which defendant allegedly threatened an unrelated victim. Defendant contends the trial court erred in admitting the evidence under Evidence Code section 1101, subdivision (b)[1] to prove his specific intent to be understood as threatening to harm the victims of the charged offenses and, in all events, should have excluded it under section 352. Although not free from doubt, we conclude the trial court did not abuse its discretion in admitting the evidence.

Background

In short, there was evidence that defendant made threatening statements to three women waiting in an elementary school parking lot to pick up students. In his defense, he claimed that he did so as the result of a prior concussion and recent use of

[1] All statutory references are to the Evidence Code unless otherwise noted.

methamphetamine, without any intent that his words be taken as a threat. In rebuttal, the prosecution presented evidence that three months after the charged incidents defendant threatened the driver of another vehicle in a road-rage incident. Although defendant does not question the sufficiency of the evidence, a rather detailed recitation is necessary to evaluate the issue presented.

Defendant was charged and convicted of two counts of violating Penal Code section 422, subdivision (a) for events that occurred on March 9, 2016. The statute applies to "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, *with the specific intent that the statement is to be taken as a threat*, even if there is no intent of actually carrying it out." (Italics added.) The only disputed issue was whether defendant acted with the specific intent required by the statute.

Defendant encountered Leslie Contreras, Maria Edith Ruiz-Garsia, and Angelica Magana outside an elementary school at which the women were picking up children. As Ms. Contreras arrived at the school, she noticed defendant approaching on a small motorcycle. He was barefoot. Before Contreras parked, appellant began to yell at her and threw his cellphone at her, striking her car. Defendant got off his motorcycle. Afraid, Contreras fled. She traveled about two blocks before realizing that she had forgotten to pick up her niece, so she returned to do so. As she approached the school again, she encountered defendant sitting inside a truck with the door open and his foot hanging out, blocking Contreras from getting by. Defendant screamed at her: "This shit is mine. Don't look at me. I am going to kill you." He repeated this three times. After defendant left, Contreras was able to pick up her niece.

Later the same day, Maria Ruiz-Garsia and Angelica Magana arrived at the school to pick up two children. The women parked about six feet behind defendant's truck in the school parking lot. Defendant approached the car window next to which Magana was sitting and began yelling at both women. He displayed aggression through "[t]he expression on his face and the way his hands were." Defendant yelled at the women that they could not park in that lot, or else he would hit them or cut their heads off. He

repeatedly called them a "bunch of whores" in an increasingly hostile tone and told them that they "needed to die." When Magana left the car to retrieve a child, defendant approached Ruiz-Garsia's car door and yelled at her that the women were all "a bunch of whores," that "no woman had the right to live," and that if she left the car he would "cut [her] head off." When defendant left, the women retrieved their children.

On March 22, a police officer interviewed defendant, who said that he had decided to threaten the women because he was feeling "mostly just mad" that day over his belief that his fiancée was cheating on him. At the officer's request, defendant wrote the women a letter of apology.

In her opening statement, defense counsel told the jury that the evidence would show, "Under the influence of prescribed hydrocodone, abusing methamphetamine, and less than two weeks after suffering a traumatic brain injury, Mr. Abarca wakes up and his fiancée isn't home. She had gone to take the children, their two twin boys, lunch at their school . . . . [¶] So he does what seemed logical to him in this moment. He rides a children's toy motorcycle, barefoot, to the school. And as they have this progressing argument, it begins to sort of devolve into the people around him. It was a perfect storm and a horrific confluence of events. [¶] Mr. Abarca paranoid, delusional, angry, and high, running amuck in the streets, shouting at people, which you'll hear, but alternately shouting at no one in particular and saying things that are troubling."

The defense presented evidence of a head injury that had hospitalized defendant 18 days before the incident; a psychological test score associated with confusion; his use of methamphetamine; expert testimony on the effects of that drug and of a pain killer defendant had taken following the head injury; and the testimony of a neuropsychologist who diagnosed defendant with moderate traumatic brain injury. The neuropsychologist described the effects of such an injury: "[V]isual spatial skills . . . are slower or less accurate. People can also have difficulties with emotional perception and expression. They can have difficulties with understanding whether they've had an injury or not, modulating their behavior. And the overall just having a brain injury in general, regardless of location, tends to make people more irritable, and, you know, more

forgetful, slower processing," Defendant testified that he "more or less" remembered stating he would cut off the women's heads, that "it could have happened, but I was mostly under the influence" at the time, and that he was not "trying to threaten anyone."

Defendant made a pretrial motion to preclude the introduction of evidence concerning a June 4, 2016 "road rage" incident. When the motion was argued, the court made no explicit ruling, but during the discussion, the court advised counsel: "I am still thinking about whether or not [testimony concerning defendant's concussion and its effects] opens the door for the 1101 evidence, because it goes to intent. So, you know, that is a tricky thing because if you're going to go down that road, then the 1101 evidence of the second 422 case[2] may come in. I am still doing some stuff on that."

After presentation of defendant's case-in-chief, the prosecution presented without further objection two witnesses concerning the June 4 incident. Melvin Guevara testified that on June 4 he was driving home around 1:30 a.m. He had to abruptly slow down because defendant was driving a Ford Mustang directly in front of him at only five miles per hour. As Guevara got closer to the Mustang, the car stopped and forced him to stop as well. Guevara tried to pass defendant, but defendant changed lanes to block him and repeatedly hit his brakes. Guevara turned on his high beams and both parties turned onto a cross-street. Defendant stopped his car and ran over to Guevara's driver's side window. "He came up over, running toward me. He was very mad. He kicked my door, and he was saying, what you want, mother fucker? You want a problem with me?" When Guevara asked why defendant was bothering him, defendant kicked Guevara's car door and made a motion as if he was going hit Guevara. Guevara noticed that defendant had something in his hand and thought that defendant was going to hit him, so he grabbed a metal pipe he had in his car and the two men swung at each other. Defendant struck Guevara's truck with a piece of metal, ran back to his Mustang, and returned, asking Guevara, "you want more problems with me, mother fucker?" Defendant yelled, "I want to shoot you right

[2] By this comment, the court was presumably alluding to the June incident, although the record does not indicate that the district attorney filed charges under section 422, or otherwise, with regard to that incident.

now, mother fucker," while pointing something at Mr. Guevara, who heard a sound "like when you pull out the ammunition out of a weapon." Defendant told Guevara, "I want to shoot you right now, and you die right now." Guevara saw a 9-millimeter semiautomatic gun in defendant's hands. Defendant pulled back the slide on the gun, and Guevara initially "froze," then sped away, and later called 911.

A police officer testified that he responded to Guevara's 911 call and shortly thereafter stopped defendant in the Mustang and arrested him. He searched the car for a gun but found none. Defendant described the incident to the officer very differently than Guevara had. In surrebuttal, the defense called defendant's fiancée, who was with defendant at the time and largely confirmed his version of the interaction with Guevara, including the fact that there was no gun in the car.

The jury found defendant guilty on both counts and he received a two-year prison sentence. He has timely appealed.

Discussion

Defendant contends that the admission of evidence of the "irrelevant and inflammatory road-rage incident" violated his rights under the federal and state constitutions. There was no constitutional violation whether or not the evidence was admitted in compliance with the Evidence Code. (*People v. Boyette* (2002) 29 Cal.4th 381, 427.) The true question is whether the trial court erred in its evidentiary ruling.

Subdivision (a) of section 1101 precludes evidence of uncharged bad acts for the purpose of showing a propensity to commit the charged act, but subdivision (b) permits the receipt of such evidence if relevant to prove a fact "other than his or her disposition to commit such an act," specifically including the intent with which the charged act was committed, provided that the evidence is not unduly prejudicial. Defendant contends that the road-rage incident sheds no light on his intentions during the incidents three months earlier, and that the evidence was highly inflammatory, especially in view of the testimony that he brandished a gun.

Initially, we reject the Attorney General's contention that defendant forfeited the objection. At the conclusion of the in limine hearing the court made no explicit ruling that

the evidence would be allowed if defendant presented evidence that his mental state precluded the necessary intent. However, the court indicated that defendant's anticipated evidence might well open the door to such evidence, and elsewhere the record suggests that the parties understood that the court had determined the evidence was admissible in view of the evidence defendant had presented.[3] We are satisfied that the defense made its position clear to the trial court and that the court considered the evidence admissible in view of the evidence offered by the defense.

Defendant recognizes that the trial court's ruling on the admissibility of the evidence is reviewed under the abuse of discretion standard. (*People v. Thomson* (2010) 49 Cal.4th 79, 128.) He argues the court abused its discretion because the evidence of what occurred on June 4 was absolutely irrelevant to what he intended on March 9 and was highly prejudicial.

Defendant's opening brief correctly states the governing principles, which we reiterate here. The admissibility of uncharged crimes depends upon three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 409.) The similarity between the charged crime and the uncharged crime is the key to admissibility under section 1101. (*Id.* at p. 402.) The least degree of similarity between an uncharged act and a charged offense is required to prove intent. (*Ibid.*) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." ' " (*Ibid*.)

The relevance of uncharged crimes is rooted in the doctrine of chances—" ' "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element

[3] For example, in a discussion with the court before the prosecution presented the road-rage evidence, defense counsel referred in passing to "what my objection was to the 1101."

cannot explain them." ' " (*People v. Rocha* (2013) 221 Cal.App.4th 1385, 1395.) The inference justifying the admission of uncharged conduct is " 'the objective improbability of the accused's involvement in so many similar incidents.' " (*Ibid*.) The following must be established to admit uncharged acts: "(1) each uncharged incident must be 'roughly similar to the charged crime' [citation]; (2) counting both charged and uncharged incidents, the accused must have been 'involved in more such events than the typical person' [citation]; and (3) the existence of the means rea 'must be in bona fide dispute.' " (*Ibid.*)

Defendant does not dispute that the second and third criteria are satisfied here, but argues that the road-rage incident was too dissimilar to the events at the school to satisfy the first. He argues: "The road rage incident involved a different victim from the charged offenses and occurred in different locations. There was no connection between them. [Defendant] did not have a motive to confront Guevara because [defendant] had threatened Gar[s]ia or Vasquez. The only common quality between the two incident[s] was angry behavior by [defendant]. This was too general [a] commonality to prove intent."

The Attorney General argues that the evidence was "highly relevant" to prove defendant's specific intent that the three women in the school parking lot take his statements as a threat: "[Defendant] presented a theory that his purported brain injury and voluntary methamphetamine intoxication prevented him from forming the specific intent to make criminal threats. The evidence of [his] threats to Mr. Guevara—at a time during which no evidence established that [he] was suffering from a similar purported impediment to forming the requisite specific intent—was manifestly relevant to show that [he acted with] the intent to threaten his victims in the charged offenses. [Citations.] . . . [¶] . . . [Defendant's] failure to provide . . . authority [that there was insufficient similarity] is unsurprising given the low similarity threshold for intent evidence, for which even a single 'crucial point of similarity' can be sufficient to establish the relevance of another bad act. (*People v. Jones* (2011) 51 Cal.4th 346, 371.) Here, the crucial point of similarity was defendant's anger and use of threats in reaction to his perception that he was being

slighted. Yet that was not the only similarity: in each case, [defendant] initiated a confrontation from his vehicle and told his victims that he was going to kill them."

The Attorney General cites several cases in which what he characterizes as the same or even a lesser degree of similarity was held sufficient to render the evidence admissible. Defendant correctly points out that in most of those cases the other incidents held admissible involved the same victim as the incident being tried. (*People v. Fruits* (2016) 247 Cal.App.4th 188, 203–204 [evidence of prior threats against same victim]; *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143 [evidence of prior stalking of same victim]; *People v. Garrett* (1994) 30 Cal.App.4th 962, 967 [evidence of prior beating of same victim].) We agree that the fact that other bad acts targeted the same victim adds force to the inference to be drawn from the recurrence of similar conduct. But the victims need not be the same for an inference, albeit weaker, to be drawn.

As the Supreme Court held in upholding the admission of evidence of a prior robbery involving different victims to prove that the defendant intended to steal when he entered a home in which he committed murder, while "there must be some degree of similarity between the charged crime and the other crime," courts require the "least degree of similarity" when the evidence is offered to prove intent. (*People v. Jones, supra,* 51 Cal.4th at p. 371.) In such a case, the requisite showing is straightforward: "As we have often explained, the recurrence of a similar result tends to negate an innocent mental state and tends to establish the presence of the normal criminal intent." (*Ibid.*)

The analysis here is equally straightforward. While the circumstances in the school parking lot and road-rage incidents were very different, both displayed intemperate fits of anger with little or no provocation. Guevara's testimony, if credited, supports the inference that defendant acted "with the specific intent that [his] statement [was] to be taken as a threat." That was the natural inference to draw from defendant's conduct, and he did not offer evidence that, during the road-rage incident, any extraordinary circumstances such as intoxication or neurological injury prevented him from forming the specific intent to threaten that his conduct naturally implied. If the jury found that defendant intended to cause Guevara to take his statements as a threat, that fact tends to

make it more likely that defendant intended to cause the women in the parking lot to take his statements as threats. The evidence strengthened the inference that he acted with the predictable intent that his words be understood as a threat.

Defendant argues that even if the threat was marginally relevant, the circumstances of the road-rage incident were so highly inflammatory that the evidence should have been excluded under section 352. While defendant's having brandished a gun in that incident, if true, undoubtedly would have made that episode far more extreme, the fact that the police officer found no weapon when he searched defendant's car shortly after the incident, as well as the testimony of defendant's fiancée denying that there was a gun, indicated that Guevara was mistaken in that respect. At a minimum, the evidence that defendant had a gun was so uncertain that the possibility would not likely have influenced the jury. In discussing the episode in his closing arguments, the prosecutor never mentioned defendant having had or brandished a gun.[4] As in *People v. Jones*, *supra*, 51 Cal.4th at page 371, the potentially inflammatory evidence of another incident "was presented quickly, and the parties did not dwell on it."

The trial court was in the best position to evaluate whether the Guevara evidence was more inflammatory and prejudicial than probative. We find nothing in the record suggesting that the court's determination was an abuse of discretion.

Disposition

The judgment is affirmed.

[4] The prosecutor described the incident as follows: "According to [Guevara], the defendant pulled up, circled back around, stopped in the middle of the road with his fiancée and kids in the car and gets out and says, what you want, mother fucker? Or words to that [effect]. Confronted this guy with his kids in the car." The prosecutor's closing remarks about that incident were: "And then also consider his behavior when he was contacting [Guevara], right? That is there for you to say, hey, look, was this just an abnormality? Was he maybe under the influence that day? Or is this something that he does repeatedly?"

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.